

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CATHLEEN A. KELLY and U.S. POSTAL SERVICE,  
POST OFFICE, Hamburg, NY

*Docket No. 99-1537; Submitted on the Record;  
Issued August 28, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has established a recurrence of disability on and after October 6, 1996 causally related to her August 3, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying her request for a hearing pursuant to section 8124.

On August 3, 1994 appellant filed a traumatic injury claim for an injury to her upper back and right shoulder sustained that day when a board swung down from a roof and hit her upper back and right shoulder. The Office accepted the claim for contusion of the right shoulder and a mild trapezial strain.

On October 6, 1996 appellant filed a recurrence claim.

In a November 7, 1996 report, Dr. John A. Moscato, an attending Board-certified orthopedic surgeon, noted that appellant had full bilateral range of motion in her shoulders, a "very slight subacromial crepitus" with no pain or impingement findings, "[p]rovocative testing does not create any pain" and neuromuscular findings appeared grossly intact with normal wrist and hand function. He opined that there did not "appear to be any pathology of the shoulder area at this time" from an orthopedic view and requested that appellant be referred to a spinal specialist to determine whether or not there was any cervical spine involvement. In concluding his report, Dr. Moscato opined that appellant had no orthopedic impairment, was capable of performing her normal work duties and that there did "not appear to be any long-term deficit related to" appellant's August 3, 1994 shoulder injury.

In a report dated November 19, 1996, Dr. Loubert S. Suddaby, a Board-certified neurological surgeon, noted physical findings as including a negative Tinel's sign bilaterally at the wrists and elbows, peripheral pulses were palpable and full volume, joints were supple and nontender and the remaining physical examination was unremarkable. He reported that he thought appellant was "perhaps more anxious about the situation than actually inhibited by it

from her work point of view” and recommended a magnetic resonance imaging scan to “assess the integrity of her cervical discs,” as well as an electromyograph and nerve conduction studies.

By letter dated May 28, 1997, the Office provided appellant with a recurrence development checklist and advised her as to the information necessary to support her claim.

By decision dated February 27, 1998, the Office denied appellant’s claim for a recurrence of disability commencing October 6, 1996.<sup>1</sup>

By letter dated October 22, 1998, appellant requested a hearing before an Office hearing representative.

In a letter decision dated November 18, 1998, the Office denied appellant’s request for a hearing before an Office hearing representative as such request was not made within 30 days of the issuance of the February 27, 1998 decision. The Office further denied appellant’s request on the grounds that the issue of a recurrence of disability could equally be well addressed during the reconsideration process upon submission of additional evidence.

The Board finds that appellant has not established a recurrence of disability on and after October 6, 1996 causally related to her August 3, 1994 employment injury.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>2</sup> This burden of proof includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>3</sup> Causal relationship is a medical issue and can be established only by medical evidence.<sup>4</sup>

In this case, none of the medical evidence submitted by appellant is sufficient to meet her burden of proof. Dr. Moscato concluded in his November 7, 1996 evaluation that appellant had no orthopedic impairment and was capable of performing her normal work duties and that there did “not appear to be any long-term deficit related to” appellant’s August 3, 1994 employment-related shoulder injury. Similarly, Dr. Suddaby in a November 19, 1996 report noted a negative

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<sup>1</sup> On June 23, 1998 appellant filed a second recurrence of disability claim and submitted medical evidence in support of her second recurrence claim. By decision dated December 16, 1998, the Office denied appellant’s claim for a recurrence of disability commencing June 23, 1998. In the attached memorandum, the Office found Dr. Moscato’s opinion insufficient as he failed to provide an opinion explaining how or whether appellant’s current disability was causally related to the August 3, 1994 employment injury. On January 9, 1999 appellant requested an oral hearing which the Office granted. The Board notes that as appellant filed her appeal with the Board on December 8, 1998, the Board does not have jurisdiction over the December 16, 1998 Office decision.

<sup>2</sup> *Dennis J. Lasanen*, 43 ECAB 549 (1992).

<sup>3</sup> *Stephen T. Perkins*, 40 ECAB 1193 (1989).

<sup>4</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

Tinel's sign bilaterally at the wrists and elbows, peripheral pulses were palpable and full volume, joints were supple and nontender and an unremarkable remaining physical examination and did not relate appellant's condition to her August 3, 1994 employment injury. The Board has held that medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet appellant's burden of proof.<sup>5</sup>

An award of compensation may not be based on surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between her condition and her employment. To establish causal relationship, appellant must submit a physician's report in which the physician reviews the factors of employment identified by appellant as causing her condition and, taking these factors into consideration as well as findings upon examination of appellant and appellant's medical history, states whether these employment factors caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his opinion. Appellant failed to submit such evidence and therefore failed to discharge her burden of proof.<sup>6</sup>

The Board also finds that the Office did not abuse its discretion in denying her request for a hearing pursuant to section 8124.

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>7</sup>

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>8</sup> Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,<sup>9</sup> when the request is made after the 30-day period for requesting a hearing<sup>10</sup> and when the request is for a second hearing on the same issue.<sup>11</sup> The Office's procedures, which require

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<sup>5</sup> *Arlonia B. Taylor*, 44 ECAB 591 (1993).

<sup>6</sup> *Corlisa L. Sims (Smith)*, 46 ECAB 172 (1994).

<sup>7</sup> *John T. Horrigan*, 47 ECAB 166 (1995).

<sup>8</sup> *Philip G. Feland*, 47 ECAB 418 (1996).

<sup>9</sup> *Frederick D. Richardson*, 45 ECAB 454 (1994).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>12</sup>

In the present case, appellant's October 22, 1998 hearing request was made more than 30 days after the February 27, 1998 decision which denied appellant's October 6, 1996 recurrence claim and, thus, appellant was not entitled to a hearing as a matter of right. Hence the Office was correct in stating in its November 18, 1998 decision that appellant was not entitled to a hearing as a matter of right because she made her hearing request more than 30 days after the issuance of the Office's decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its November 18, 1998 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case was medical and could be resolved by submitting additional medical evidence to establish that her injury was causally related to factors of her employment. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.<sup>13</sup> In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

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<sup>12</sup> *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

<sup>13</sup> *Frederick D. Richardson*, *supra* note 8; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated November 18 and February 27, 1998 are hereby affirmed.

Dated, Washington, D.C.  
August 28, 2000

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member